



OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 630

RIN: 3206-A004

Scheduling of Annual Leave by Employees Determined Necessary to Respond to Certain National Emergencies

AGENCY: Office of Personnel Management.

ACTION: Interim rule.

SUMMARY: The Office of Personnel Management (OPM) is revising the interim regulation regarding the restoration of annual leave for employees who are essential to respond to certain national emergencies, such as the National Emergency Concerning the Novel Coronavirus Disease (COVID-19). This rule extends the latest possible termination date for the exigency established in connection with the COVID-19 national emergency, which would be March 13, 2023, under the current interim regulations. Under this new rule, that date would be the date the national emergency is ended by the President. This rule also provides for special handling of restored annual leave resulting from an agency-specific ongoing exigency that is directly related to a matter that was determined to be a national emergency exigency and that immediately follows that national emergency exigency. Finally, this rule expands an agency's authority to exempt employees from the advance annual leave scheduling requirement in the leave year during which a national emergency exigency is terminated.

DATES: The interim regulations are effective on March 13, 2023. Comments must be received on or before on May 12, 2023.

ADDRESSES: You may submit comments, identified by docket number and/or Regulatory Information Number (RIN) and title, by the following method:

Federal Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

All submissions received must include the agency name and docket number or RIN for this document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

OPM will address previously submitted comments on the August 10, 2020, interim regulation and any comments submitted regarding this new interim regulation when it issues final regulations.

FOR FURTHER INFORMATION CONTACT: Doris Rippey by telephone at (202) 606-2858 or by e-mail at pay-leave-policy@opm.gov.

SUPPLEMENTARY INFORMATION: On August 10, 2020, OPM published an interim final rule (85 FR 48096¹) to replace the reserved 5 CFR 630.310 with a new 5 CFR 630.310 to (1) allow agencies to continue to meet their vital missions while streamlining the process for restoration of annual leave for employees whose services are determined by the agency head (or designee) to be essential for the response to certain national emergencies and (2) permit the Director of OPM to deem a specific national emergency, as declared by the President under the National Emergencies Act, to be an exigency of the public business for the purpose of restoring annual leave under this authority. OPM will address previously submitted comments on the August 10, 2020, interim regulation and any comments submitted regarding this new interim regulation when it issues final regulations.

On March 13, 2020, the President issued Proclamation 9994 declaring a “National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak” (85 FR 15337²). On August 27, 2020, the Director of OPM issued CPM 2020-11³ announcing the

¹ <https://www.federalregister.gov/documents/2020/08/10/2020-16823/scheduling-of-annual-leave-by-employees-determined-necessary-to-respond-to-certain-national>

² <https://www.govinfo.gov/content/pkg/FR-2020-03-18/pdf/2020-05794.pdf>

³ <https://www.chcoc.gov/content/interim-regulations-scheduling-annual-leave-employees-performing-services-determined-be>

publication of an interim final rule on the scheduling of annual leave by employees whose work is essential to respond to certain national emergencies. The memo also announced the Director's determination that the COVID-19 national emergency constituted an exigency of the public business for the purpose of restoring forfeited annual leave and authorized agencies to streamline the process for the restoration of annual leave for the COVID-19 national emergency as outlined in the interim regulations. Agencies were required to determine the specific employees or groups of employees whose services were essential in response to the COVID-19 national emergency and were qualified for coverage under the regulations and inform designated employees in writing of such determinations.

Termination of the National Emergency Exigency

Under the interim regulation of August 10, 2020, an agency head (or designee) may not grant more than two 12-month extensions of a national emergency exigency. (See 5 CFR 630.310(f)(2)(iv).) As noted above, the President declared the COVID-19 outbreak a national emergency on March 13, 2020. Assuming the exigency has not been terminated for an employee or a group of employees for another reason listed in § 630.310(f)(2), the regulation requires the agency to establish the date for termination of the exigency as 12 months after the declaration of the exigency—i.e., March 13, 2021. The agency may extend this deadline annually by an additional 12 months, but may not grant more than two 12-month extensions (§ 630.310(f)(2)(iv)). Therefore, with respect to the COVID-19 national emergency, an agency was authorized to first extend the termination date of the exigency until March 13, 2022, and then to further extend the termination date until March 13, 2023.

On February 10, 2023, President Biden extended the COVID-19 national emergency and announced that he anticipates ending that emergency on May 11, 2023. In light of these circumstances, to avoid confusion and simplify the rules for restored annual leave, this new interim rule will automatically deem a second agency extension of the COVID-19 national emergency exigency that had been set to end on March 13, 2023, to continue

through the date that the President ends the COVID-19 national emergency, which is expected to be May 11, 2023. Under the August 10, 2020, interim regulation, an agency head (or designee) was not permitted to grant more than two 12-month extensions to the deadline for establishing the termination date of the exigency of the public business. (See 5 CFR 630.310(f)(2)(iv).) The continuation of this second extension is outlined in new paragraph (i) being added to § 630.310.

The August 10, 2020, interim regulation already addressed what would happen when a national emergency exigency terminates for an employee or a group of employees—all restored leave to an employee's credit (from any source) is consolidated into one account and a single time limit is applied, using the tiered time limits in § 630.310(d) that vary based on the balance of hours (§ 630.310(e)).

The August 10, 2020, interim regulation also addressed the possibility of not applying normal rules requiring advance scheduling of annual leave in § 630.308(a) at the end of the leave year in which the national emergency exigency terminated based on an agency determination that the employee was unable to comply with the advance scheduling requirement because of circumstances beyond the employee's control (§ 630.310(g)). We are revising paragraph (g) of § 630.310 to broaden the authority of an agency head (or designee) to exempt an employee or group of employees from the advanced scheduling requirement under § 630.308(a) during the leave year in which the national emergency exigency terminated. Under the revised paragraph (g), the agency head (or designee) would simply have to make a determination that such an exemption is warranted. This determination will no longer be solely tied to whether the employee was unable to comply with the advance scheduling requirement because of circumstances beyond the employee's control. We are also adding a requirement that agencies notify in writing any employee that is exempted from the advance scheduling requirement. In applying the revised paragraph (g) to the termination of the COVID-19 national emergency

exigency, an agency will be able to choose to not apply the advance scheduling requirement this leave year since the exigency is ending during leave year 2023.

Special Treatment of an Ongoing Exigency Related to the National Emergency Exigency

Regardless of the anticipated termination date of the national emergency regarding the COVID-19 pandemic, there are also anticipated continuing significant workload implications for certain categories of employees at certain agencies, such as the Department of Veterans Affairs. Such agencies may also be dealing with lingering effects, such as the fact that many employees built up large balances of unused annual leave, which if used quickly would result in challenges in meeting current workload demands. In order to allow agencies to better manage workload demands, OPM is adding a new regulation to cover employees identified as performing work in connection with an “ongoing exigency” related to the circumstances concerning COVID-19 and its aftermath effects. The new regulation would cover not only those who were affected by the COVID-19 national emergency but also future national emergencies that may present similar issues.

The new paragraph (h) being added to § 630.310 would have the following elements:

- *Paragraph (h)(1)* – When a national emergency exigency terminates under paragraph (f)(2)(i), (ii), or (iv), an agency head (or designee) may determine that certain agency employees immediately continue to be subject to an “ongoing exigency” of the public business. For example, once the COVID-19 national emergency terminates, an agency could determine that certain of its healthcare workers continue to be subject to an ongoing exigency such that they cannot yet schedule and take annual leave. An ongoing exigency of the public business is an exigency that commences immediately after the termination of a national emergency exigency and is directly related to the matter that was previously determined to be a national emergency exigency. In order for an employee to be

covered under an ongoing exigency, the employee must first be covered by a national emergency exigency and then be covered by the ongoing exigency without a break in time. For example, if the COVID-19 national emergency ends on May 11, 2023, due to a declaration by the President, an agency could establish effective May 12, 2023, an agency-specific ongoing exigency related to the circumstances of COVID-19 and its lingering effects for certain employees.

- *Paragraph (h)(2)* – During the entire period during which an employee is covered by the above-described ongoing exigency, the employee will not be subject to time limits on usage of any restored leave to the employee's credit under 5 U.S.C. 6304(d), including a time limit established under § 630.310(d) that was based on the termination of the national emergency exigency. When the ongoing exigency ends, all restored annual leave under 5 U.S.C. 6304(d) to the employee's credit must be consolidated at that time and made subject to a single time limit that is determined under the rules in § 630.310(d), using the termination date of the ongoing exigency in place of the termination date of the national emergency exigency. Thus, if an agency establishes an ongoing exigency related to COVID-19 that is terminated on May 11, 2024, all restored leave to the employee's credit at that time (including the restored leave that was part of the consolidated total at the end the COVID-19 national emergency exigency) will be consolidated into a single restored leave account and subject to a time limit established using the tiered time limits in § 630.310(d) that vary based on the balance of hours, with the May 11, 2024, termination date being used.
- *Paragraph (h)(3)* – During the entire period during which an employee is covered by the ongoing exigency, the employee will not be subject to the advance scheduling requirements in § 630.308(a). Also, even after the ongoing exigency terminates, an agency may choose to exempt an employee or a group of employees from the

advanced scheduling requirement in § 630.308(a) for the remainder of the leave year in which the termination takes place.

- *Paragraph (h)(4)* – Coverage of an employee or a group of employees under an ongoing exigency may not be continued for more than 12 months unless the Director of OPM approves the employing agency’s request for one or more time-limited waivers based on a critical agency need for the services of the employees. The OPM Director will prescribe the specific requirements and procedures associated with an agency request.
- *Paragraph (h)(5)* – If the agency-authorized ongoing exigency covering an employee lasts for 3 full calendar years and meets the other requirements under § 630.309 to qualify as an extended exigency, the usage time limits in that section would be used in place of the time limits in § 630.310(d). We note that the time an employee spent covered by the preceding national emergency exigency would not be considered in determining if the ongoing exigency is an extended exigency.

For example, if the COVID-19 national emergency terminates on May 11, 2023, an agency could authorize an ongoing exigency directly related to COVID-19 beginning on May 12, 2023. To qualify as an extended exigency under § 630.309(b), the agency must first receive the Director of OPM’s approval of the required time-limited waivers of the ongoing exigency, as required under paragraph (h)(4), and the ongoing exigency must last at least 3 full calendar years and must meet the other requirements at § 630.309(b). Thus, the ongoing exigency must last at least until January 1, 2027, to qualify. The time an employee is covered under the COVID-19 national emergency (beginning on March 13, 2020, and ending on May 11, 2023) would not count towards determining whether the exigency is an extended exigency under § 630.309. If the ongoing exigency begins on May 12, 2023, 3 full calendar years—2024, 2025, and 2026—would need to elapse before the agency-authorized

ongoing exigency would meet the time requirements at § 630.309(b)(2) to potentially qualify as an extended exigency under § 630.309.

Administrative Procedure Act

Both the Administrative Procedure Act (APA) and the Civil Service Reform Act (CSRA)'s parallel rulemaking provision allow OPM to forego standard notice and comment procedures, and the standard 30-day delayed effective date, in certain circumstances. Under the APA, notice and comment and a 30-day delayed effective date is not required "when an agency for good cause finds ... that notice and public procedures [would be] impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. 553(b)(B); *see id.* 553(d)(d). Likewise, the CSRA provides that notice and comment is not required if a rule "is temporary in nature and ... ne[eds] to be implemented expeditiously." *Id.* 1103(b)(3). I find that both standards are met here and OPM is thus issuing this as an interim final rule.

President Biden announced in February 2023 that he anticipates ending the national emergency associated with COVID-19 on May 11, 2023. At present, however, the Director's designation of an exigency of the public business will expire on March 13, 2023. OPM has been notified that there are continuing significant lingering workload implications of the COVID-19 national emergency for certain categories of employees at certain agencies, such as the Department of Veterans Affairs, such that these employees continue to be unable to schedule and take their annual leave. OPM thus needs to issue this rule before the current March expiration to protect such employees and ensure agencies can operate at the capacity necessary to continue addressing the COVID-19 national emergency. Given the Administration's recent announcement of its intention to end the national emergency, notice and comment procedures, as well as a delayed effective date, would be impracticable and contrary to the public interest, as they would curtail OPM's ability to extend this important protection for federal workers who are essential to the Government's COVID-19 response.

Moreover, prior to the termination of the COVID-19 national emergency, agencies will need to implement procedures to determine whether they will authorize an ongoing exigency and, if they do so, to make determinations as to which employees will be covered by such ongoing exigency for purposes of utilizing the restored annual leave authorities under this rule. Further, once covered employees are identified, agencies will need to communicate to those employees that they are subject to the authorities in this rule and that the advance scheduling requirement does not apply to them. Notice and comment and a delayed effective date would thus be impracticable and contrary to the public interest as it would impede the ongoing work of agencies across the federal government to address the impacts of COVID-19, as well as harming employees who, absent these regulatory changes, could permanently lose leave that they may be unable to take as a result of such ongoing exigencies.

Accordingly, in order to give practical effect to these regulations, I find that good cause exists to waive the general notice of proposed rulemaking pursuant to 5 U.S.C. 553(b)(B) and the 30-day delay in effective date pursuant to 5 U.S.C. 553(d)(3). For similar reasons, I find that the interim final rule is temporary in nature, and expeditious timing is required because of the circumstances agencies will continue to face even after the COVID-19 national emergency has officially ended. *See* 5 U.S.C. 1103(b)(3). OPM will promulgate a final rule as soon as practical after receiving public comments on this interim final rule.

Executive Order 13563 and Executive Order 12866

The Office of Management and Budget has reviewed this rule in accordance with E.O. 13563 and 12866.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it will apply only to Federal agencies and employees.

Paperwork Reduction Act Requirements

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act.

List of Subjects in 5 CFR Part 630

Government employees.

Office of Personnel Management.

Stephen Hickman,

Federal Register Liaison.

Accordingly, OPM amends 5 CFR part 630 as follows:

PART 630—ABSENCE AND LEAVE

1. The authority citation for part 630 continues to read as follows:

5 U.S.C. chapter 63 as follows: Subparts A through E issued under 5 U.S.C. 6133(a) (read with 5 U.S.C. 6129), 6303(e) and (f), 6304(d)(2), 6306(b), 6308(a), and 6311; subpart F issued under 5 U.S.C. 6305(a) and 6311 and E.O. 11228, 30 FR 7739, 3 CFR, 1974 Comp., p. 163; subpart G issued under 5 U.S.C. 6305(c) and 6311; subpart H issued under 5 U.S.C. 6133(a) (read with 5 U.S.C. 6129) and 6326(b); subpart I issued under 5 U.S.C. 6332, 6334(c), 6336(a)(1) and (d), and 6340; subpart J issued under 5 U.S.C. 6340, 6363, 6365(d), 6367(e), and 6373(a); subpart K issued under 5 U.S.C. 6391(g); subpart L issued under 5 U.S.C. 6383(f) and 6387; subpart M issued under sec. 2(d), Pub. L. 114-75, 129 Stat. 641 (5 U.S.C. 6329 note); subpart P issued under 5 U.S.C. 6329c(d); and subpart Q issued under 5 U.S.C. 6387.

2. Amend § 630.310 by revising paragraph (g) and adding new paragraphs (h) and (i) to read as follows:

§ 630.310 Scheduling of annual leave by employees whose work is essential to respond to certain national emergencies.

* * * * *

(g) When the agency head (or designee) fixes a termination date of the exigency of the public business under paragraph (f)(2) of this section, each affected employee must make a reasonable effort to comply with the scheduling requirement in § 630.308(a). The head of the agency (or designee), in his or her sole and exclusive discretion, may exempt such an employee or group of employees from the advanced scheduling requirement in § 630.308(a) for the remainder of the leave year if coverage under paragraphs (a) and (b) of this section terminates during that leave year and if the agency head (or designee) determines such exemption is warranted. The agency head (or designee) must notify any employee exempted from the scheduling requirement in writing.

(h)(1) Upon termination of an exigency established under paragraphs (a) and (b) of this section based on the ending of the exigency under paragraphs (f)(2)(i), (ii), or (iv) of this section, an agency head (or designee) may determine that certain agency employees continue to be subject to an ongoing exigency of the public business. An ongoing exigency of the public business is an exigency that commences immediately after the termination of a national emergency exigency and is directly related to the matter that was previously determined to be a national emergency exigency. In order for an employee to be covered under an ongoing exigency, the employee must first be covered by a national emergency exigency and then be covered by the ongoing exigency without a break in time.

(2) For the entire period during which an employee is covered by such an ongoing exigency, the employee will not be subject to time limits on usage of any restored leave to the employee's credit under 5 U.S.C. 6304(d), including a time limit established under paragraph (d) of this section that is determined based on the termination of the national emergency exigency. When the ongoing exigency ends, all restored annual leave under 5 U.S.C. 6304(d) to the employee's credit must be consolidated at that time and made subject to a single time limit that is determined under the rules in paragraph (d) of this section,

using the termination date of the ongoing exigency in place of the termination date of the national emergency exigency.

(3) For the entire period during which an employee is covered by such an ongoing exigency, the employee will not be subject to the advance scheduling requirements in § 630.308(a). An agency head (or designee), in his or her sole and exclusive discretion, may exempt an employee or group of employees from the advanced scheduling requirement in § 630.308(a) for the remainder of the leave year if coverage under the ongoing exigency terminates during that leave year and if the agency head (or designee) determines such exemption is warranted. The agency head (or designee) must notify any employee exempted from the scheduling requirement in writing.

(4) Employee coverage under such an ongoing exigency may not be continued for more than 12 months unless the agency head (or designee) requests, and the Director of OPM approves, one or more time-limited waivers based on a critical agency need for the services of the employee or group of employees.

(5) Notwithstanding paragraph (h)(2) of this section, if an ongoing exigency (which excludes time covered by the preceding national emergency exigency) also qualifies as an extended exigency under § 630.309, the time limit for use of the restored leave under paragraph (a) of that section must be applied to the consolidated restored leave.

(i) Notwithstanding paragraph (f)(2)(iv), an agency extension granted through March 13, 2023, under that paragraph for an exigency established under this section based on the COVID-19 national emergency declared on March 13, 2020, must be deemed to continue through the date that the President ends that national emergency.